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FILED
YOLO SUPERIOR COURT

SEP 11 2009
By [Signature]
Deputy

SUPERIOR COURT OF CALIFORNIA
COUNTY OF YOLO

THE PEOPLE OF THE STATE OF
CALIFORNIA,
vs.
MARCO ANTONIO TOPETE,
Defendant.

Case No.: 08-3355

NOTICE OF MOTION AND MOTION TO
SET ASIDE CIRCUMSTANCE C OF
COUNT 1 AND COUNT 5 OF THE
INDICTMENT [Penal Code § 995]

Date: November 6, 2009
Time: 8:30 a.m.
Dept: 9

TO: THE ABOVE-ENTITLED COURT AND THE DISTRICT ATTORNEY:

NOTICE IS HEREBY GIVEN that on the date and time indicated above, or on such date as the matter may be heard, Defendant MARCO TOPETE, by and through his attorneys Hayes H. Gable III and Thomas A. Purtell, will move the court for an order to set aside the gang enhancement alleged in special circumstance C of count 1 and count 5 of the indictment.

This motion is made pursuant to California Penal Code section 995 on the grounds that the prosecution failed to present sufficient evidence at the grand jury hearing to provide probable cause to find an indictment against the defendant of a special circumstance charge of committing murder in furtherance of a street gang in violation of Penal Code section 190.2, subdivision

1 (a)(22), as defined by Penal Code section 186.22, subdivision (f) [special circumstance C of
2 count 1], or the charge of active participation in a criminal street gang in violation of Penal Code
3 section 186.22, subdivision (a) [count 5].

4 This motion will be based on this notice of motion, the memorandum of points and
5 authorities, all papers and records on file in this action, and such oral and documentary evidence
6 as may be presented at the hearing on this motion.

7
8 Dated: September 9, 2009

9 HAYES H. GABLE III
10 THOMAS A. PURTELL

11 By: 

12 HAYES H. GABLE III
13 Attorney for the Defendant
14 MARCO ANTONIO TOPETE
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16 **COUNTY OF YOLO**

17 THE PEOPLE OF THE STATE OF

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29 **INTRODUCTION**

30 The grand jury heard testimony regarding the crimes alleged against Marco Antonio
31 Topete. The only testimony offered to support the allegation that the crimes were gang-related
32 or committed for the benefit of a gang were from Woodland Police Officer Ronald Cordova who
33 testified as a "gang expert" regarding the street gang commonly known as the Norteños and
34 defendant Topete specifically. Although his testimony arguably established Topete's association
35 with a gang, his opinion that Topete's lone actions were for the benefit of the Norteño street gang
36 was mere speculation and woefully unsupported by the facts established by the other witnesses.
37 Therefore, the special circumstance C of count 1 and count 5 of the indictment must be set aside
38 insofar as they were not supported by probable cause.

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STATEMENT OF FACTS

A. Initial Police Contact

At the grand jury indictment held on August 9, 2008, the People called Parole Agent Joe Modesto who testified that on June 15, 2008, at about 4:00 p.m., he received a call from the Davis Police Department dispatcher regarding his parolee, Marco Topete. (RT 19.) The dispatcher related that Topete had been seen at a park in Davis, placing an infant child in a vehicle. He appeared to have been drinking heavily. (RT 20.) Parole Agent Modesto had placed a condition on Topete's parole that he not possess or consume alcohol because Topete "has a tendency to become violent [when he drinks]." (RT 27.) Based on that and the fact that Topete had been convicted of two serious felonies, and was therefore a "second striker" (RT 25), Modesto advised the dispatcher to put out a "be on the lookout" ("BOL") to Davis and Yolo County law enforcement agencies for his immediate arrest and that he be considered dangerous. (RT 20.) Topete was known to drive a blue Ford Taurus sedan. (RT 21.)

B. Incident at 17 Sunset

Matthew Jameson, a Woodland Police officer was on duty the night of June 15, 2008. At about 8:53 p.m., while talking with a citizen at [REDACTED] Woodland, he heard what sounded like gunfire -- six to eight shots in rapid succession. Thereafter, he was dispatched to the area of Ashley and West Beamer Streets. (RT 30.) He ended on [REDACTED] where he observed a heavy-set Hispanic male standing in front of [REDACTED] and observed two males heading into the backyard, one of which was wearing a white t-shirt and light colored jeans. (RT 31.) It was just starting to get dark. (RT 31.)

Officer Jameson cleared the backyard and secured the scene, then ran the license plate numbers of two cars parked in the driveway of [REDACTED]. (RT 35.) One came back registered to a female, the other was registered to Benito Fuentes (aka "Junior"). (RT 35.) Officer Jameson also identified the Hispanic male in front of [REDACTED] as Mark Lopez. (RT 41.) He subsequently found six spent Winchester Remington .223 caliber shell casings near the gutter on the street, which he recovered and put in an evidence bag. (RT 34.) He then took photographs of the scene and spoke with Mr. Lopez. (RT 40.) Lopez appeared sober and did not provide any information

1 regarding the shots fired. Jameson then got an "Officer Down" call at 9:41 p.m., and left the
2 scene to assist.

3 **Thomas Davis** is a sergeant with the Woodland Police Department. (RT 101.) On June
4 19, 2008, he took a statement from Jaime Delgado, who resides on [REDACTED] regarding reports of
5 gunfire there on June 15, 2008. (RT 102.) He testified that Delgado reported seeing a vehicle at
6 Benito Fuentes's residence, [REDACTED] on four different occasions during the day, and once
7 directly after the shooting. (RT 104.) Delgado described the vehicle as a four-door, newer
8 model, grey-colored Ford Taurus. (RT 105.) He also reported that Delgado saw Fuentes, who he
9 knows to be involved with the Norteño street gang, outside the residence with two other males
10 and the driver of the Ford Taurus earlier that day. (RT 106.) On June 20, 2008, Delgado was
11 shown a photo lineup to see if he could identify the driver of the Taurus; he chose an unknown
12 individual by the last name Alvarez. (RT 109.) Sgt. Davis testified that Delgado expressed
13 concern for the safety of his family throughout the process and was hesitant to assist the police.
14 (RT 103, 107, 109.) According to Davis, Delgado was "in fear because he knew of Marco's
15 history of violence, being a gang member in prison." (RT 109:10-11.)

16 **Jaime Delgado** testified regarding gunfire heard on June 15, 2008, near his residence on
17 [REDACTED] (RT 43.) He testified that he had been outside most of the day and that when he went
18 inside he heard gunshots; then his children ran inside also, reporting they heard gunshots as well.
19 (RT 43.) He then exited his house and saw numerous neighbors outside and police officers
20 coming down the street. (RT 43.) He also observed a blue or gray Ford Taurus driving away, but
21 was unable to describe the driver, other than the tattoo on his left arm. (RT 44.) Mr. Delgado
22 reported that the car took off at a normal speed (RT 44, 46) and that the driver was wearing a
23 baseball cap and a nice dress shirt with red and white stripes. (RT 45.) He could not remember if
24 there was a tattoo on the driver's neck. (RT 45, 46.) He also stated that he had seen the Ford
25 Taurus prior to the shooting (RT 46) and remembers seeing a baby seat in the back of the car.
26 (RT 56.) He observed the vehicle from about five to ten yards away (RT 46) and only saw the
27 driver's face in profile and remembers he did not have facial hair. (RT 60, 61.) He also observed
28 a car drive by with three Latino males in it, all wearing white t-shirts. The vehicle drove by,
made a U-turn before [REDACTED], and drove down [REDACTED]. (RT 56.)

1 Mr. Delgado denied being concerned for his family and expressed frustration with law
2 enforcement continuing to question him over and over regarding what he saw. (RT 50, 53, 57,
3 58.) He expressed the feeling that officers "lie a lot" and that they "want to make it bigger than
4 what it really is." (RT 49.) He was also angry that he was threatened with arrest if he did not
5 appear and testify before the Grand Jury. (RT 53.)

6 The Topete family had previously lived down the street from Delgado, and he testified
7 that Marco Topete's father helped his brother-in-law to establish U.S. residency. (RT 51.) He
8 knew Topete in high school (RT 52) but had heard he had been incarcerated and has not seen
9 him in over ten years. (RT 62.) He doesn't know if the driver was Marco Topete. If he was able
10 to identify him, he would have simply said so. (RT 62.) He knows that Benito Fuentes's
11 moniker is "Junior" and that he was just released from Folsom Prison, but is not really familiar
12 with him. (RT 48.) He denied any gang involvement and testified that his tattoo was a serpent
13 covering up his ex-wife's name and was not gang related. (RT 47.)

14 [REDACTED]
15 Deputy Chris Whitehead of the Yolo County Sheriff's Department testified regarding
16 Deputy Diaz's dash cam footage. (RT 86.) He testified that Detective Harmon removed the disc
17 from Deputy Diaz's patrol car while at the scene on June 15, 2008. Deputy Whitehead narrated
18 that the footage starts at the Pilot gas station off County Road 8. (RT 94.) The footage shows
19 Deputy Diaz following a Taurus out of the gas station, traveling eastbound on County Road 8
20 and then proceeding through a red traffic signal and traveling northbound on County Road 99 W.
21 (RT 95.) Deputy Diaz's dash cam recorded him following the Taurus to County Road 4 where it
22 made a U-turn and traveled southbound on County Road 99W until County Road 5. Both
23 vehicles turned westbound on County Road 5 until it dead ends, then traveled back eastbound
24 and stopped about [REDACTED] (RT 95.)

25 Deputy Whitehead was asked about the actions of the driver of the Taurus. He testified
26 that he observed, watching the video, that the driver committed a number of Vehicle Code
27 violations including speeding, reckless driving, failure to yield, felony evading, crossing over a
28 double yellow and driving on the wrong side of the road. (RT 96.) He based the last two
violations on the fact that the Taurus U-turned on County Road 99W and drove into Deputy

1 Diaz's lane, head-on toward the patrol car. (RT 97.) He also testified that the speedometer
2 indicates that Deputy Diaz was driving 108 miles per hour and was unable to catch up to the
3 Taurus, even at that speed. (RT 97.)

4 **Yolo County Deputy Sheriff Hector Bautista**, testified that he was working the night of
5 June 15, 2008, on the west side of the county in Madison about 17 miles from Deputy Diaz's
6 location in Dunnigan. (RT 119.) Dispatch alerted him that Deputy Diaz was in trouble after an
7 initial stop and indicated that the suspect had fled at a high rate of speed. (RT 111.) Deputy
8 Bautista knew that the driver was suspected to be driving under the influence of alcohol. His was
9 one of the closer units available to provide cover for Deputy Diaz. (RT 112.) Nine minutes of
10 his dash cam were played for the Grand Jury showing his arrival at [REDACTED]
11 Dunnigan, California (RT 112.)

12 He testified that when he arrived, Deputy Diaz had his handgun drawn and was bent over
13 at the waist, attempting to use the right rear of his patrol car to partially shield his body. (RT
14 113.) Deputy Bautista stated that he asked which way the suspect fled, Deputy Diaz responded
15 by pointing to the residence, which he mistook to mean that the suspect was inside rather than
16 that the suspect had gone around the residence. (RT 114.) Deputy Bautista then noticed that
17 Deputy Diaz was having difficulty breathing and was having trouble standing. (RT 114.) He
18 then noticed there was blood on both sides and the back of Deputy Diaz's head and thought he'd
19 been struck with a shotgun. (RT 114.) Deputy Pineda arrived, covered the passenger side of
20 Bautista's vehicle with his rifle, and relayed information on the radio that the subject was
21 barricaded in the residence. (RT 117.) Deputy Pineda evacuated Deputy Diaz. (RT 115.)

22 Deputy Bautista testified that he remained behind and noticed that there was blood on
23 Deputy Diaz's right rear fender, the left rear passenger window was broken, there was glass on
24 the floorboard, and the windshield had circular holes broken through it. (RT 115.) He then ran
25 back to his car and noticed there was another vehicle at the scene. (RT 116.) He started to retreat
26 and set up a perimeter after determining it was not safe to remain in the area. (RT 118.) Deputy
27 Bautista stated that he did not search the other vehicle because his first priority was to render aid
28 to Deputy Diaz and then he determined safety required his retreat. (RT 118.)

1 **Yolo County Deputy Sheriff Jose Pineda** responded with Deputy Bautista on June 15,
2 2008, to the residence on [REDACTED] (RT 122, 123.) He also reported seeing
3 Deputy Diaz leaning over the passenger side of his patrol car with his handgun drawn and that he
4 was having trouble standing. (RT 123.) Deputy Diaz stated that he thought he'd been shot by a
5 shotgun. (RT 123.) Deputy Pineda testified that he did see a small hole in the upper left part of
6 his chest and thought Deputy Diaz had been grazed. (RT 124.) He testified that he assisted
7 Deputy Diaz into his patrol car and drove to the end of the roadway where the members of the
8 Dunnigan Fire Department helped to assess the injuries. (RT 124.) He took Deputy Diaz's gun
9 belt and vest, which he secured in his patrol car. (RT 125.) When Detective Jimenez arrived on
10 the scene, Deputy Pineda informed him that the items were in his patrol car. (RT 126.)

11 **Detective Ray Jimenez** was the lead investigator in the case. He testified that he first
12 responded to the scene on Monday, June 16, 2008, at 3:00 a.m. (RT 163.)

13 Detective Jimenez reviewed the dash cam and determined that Deputy Diaz followed
14 Topete past the residence, where the porch light was on, and pursued it back to the same location
15 after the vehicle made a u-turn, where the Taurus was parked, with the lights on. (RT 178-179.)
16 Detective Jimenez estimated about two minutes passed between the time Deputy Diaz came
17 upon the parked vehicle and the shots being fired. (RT 178.) Deputy Diaz's floodlight was
18 pointed toward the field next to the residence in a southeastern direction. (RT 168.) Then Deputy
19 Diaz shined his flashlight across the hood of his car in the same direction (RT 167), and instantly
20 (RT 168) about 20 rounds are fired (RT 185). Deputy Diaz dropped his flashlight (RT 167) and
21 tried to move to another area. (RT 186.) Then three pops are heard, which Detective Jimenez
22 believed to be from Deputy Diaz's .40 caliber Glock. (RT 186.) Casings were found in front of
23 the patrol car driver's door and Deputy Diaz's weapon was missing at least three rounds. (RT
24 186-187.) The Department of Justice processed the scene after it was secure and put dowels in
25 each of the approximately 14 bullet holes in Deputy Diaz's patrol car. (RT 164.) Deputy
26 Jimenez testified that the dowels indicated that the shots came from the direction of the
27 residence, near a green chair (RT 165) close to the southwest corner of the residence (RT 180)
28 where there is no sensor light (RT 185) and the defendant would have been able to hide in a very
dark area by the house. (RT 182.) There are no obstructions between where Deputy Diaz was

1 shot and the area where casings were found near the green chair. (RT 181.) Although there is a
2 chain link fence between the home and Deputy Diaz's patrol car it would not have blocked the
3 view of the vehicle. (RT 184.) Seventeen rifle casings were found near that location and were
4 collected and sent to Criminalist Dunbar. (RT 166.)

5 A black nylon rifle bag was found 50 yards northwest of the residence, in the direction of
6 the Dunnigan rest area of northbound I-5. (RT 171.) Two spent .223 caliber rifle casings were
7 found in the driver's seat of the Taurus (RT 174) which was determined to be registered to
8 Marco Topete. (RT 175.) Detective Jimenez also contacted Jesse and Melissa Gonzales,
9 [REDACTED] at 3:30 a.m. the morning after the shooting. (RT 169.) No
10 guns or ammunition were found in the home. (RT 170.) Jesse Gonzales called a few days later
11 after locating a rifle strap north of the back portion of his home. (RT 173-174.)

12 Sergeant Johnson also assisted Detective Jimenez in reviewing Deputy Diaz's ballistic
13 vest a few days later. (RT 156, 175.) They located a hole on the flap near the left side pocket of
14 Deputy Diaz's shirt and another hole in the center of the chest area. (RT 175.) The bulletproof
15 vest had two holes lining up in the same locations. (RT 176.) The hole on the upper left
16 penetrated through the vest. (RT 177.) The hole in the middle of the chest was located where the
17 trauma plate is inserted into a pocket in the vest. (RT 176.) Deputy Diaz kept a plastic bag with
18 religious articles in the trauma plate pocket which had also been penetrated. (RT 177.) The
19 backside of the vest had been penetrated as well. (RT 178.) The vest was penetrated because it
20 was designed to stop handguns, not rifle rounds of the caliber involved in this incident. (RT 183.)

21 **Detective Sergeant Dale Johnson** assisted in locating Marco Topete on June 16, 2008.
22 (RT 153.) He was leading a team assigned to clear an open lot north of [REDACTED]
23 (RT 154.) They sent a K-9 dog, but it was unable to locate anything. Sergeant Anthony Cucchi
24 with the Woodland Police Department noticed an individual in a group of trees and foliage off
25 County Road 88C, just south of County Road 4. (RT 153-54.) Sergeant Johnson assisted in
26 dragging him out of the foliage where he was laying on his back with his hands extended above
27 his head. (RT 154.) The defendant was wearing a red t-shirt, white shorts with red and black
28 striping, and white tennis shoes. (RT 155.)

1 At about 11:10 a.m., Johnson was called by a CHP officer to a rest stop near Dunnigan on
2 the northbound side of I-5. (RT 149.) Apparently a citizen had reported seeing a rifle at that
3 location. (RT 149.) He testified that at that rest stop, five minutes from where the defendant was
4 found (RT 159), he recovered an Olympic Arms, semi-automatic rifle, .223 or .556 caliber, just
5 east of the rest room. (RT 149-150.) It had a 30-round magazine and bore serial number T1861.
6 (RT 151.) He wore gloves throughout the process of removing the round chambered inside the
7 weapon and noted that there was one round in the magazine. (RT 151, 156.) The weapon was
8 collected by CSI Del Stewart and handed to the Department of Justice. (RT 152.) A special agent
9 from Alcohol, Tobacco, Firearms and Explosives (RT 158) determined that the gun was
10 manufactured in 1990 by an employee of the San Francisco Gun exchange, which closed in the
11 late 1990's. (RT 159.) He did not know who had purchased the weapon. (RT 159.)

12 **Deputy Gary Balfour**, a SWAT team detective with the Sacramento County Sheriff's
13 Department, responded to assist the Yolo County Sheriff's Department on June 15, 2008, at
14 [REDACTED] California (RT 127.) He was instructed to retrieve a baby
15 from a Taurus parked at the scene. (RT 128.) The team unlocked the back door, cut the seat belt,
16 and pulled the baby seat out with the baby. (RT 128.) The baby appeared to be sleeping the
17 entire time. (RT 128.)

18 Deputy Balfour then went to Deputy Diaz's patrol car. The car was still running, the
19 headlights and emergency lights were on, the driver's door was open, and the back doors were
20 locked. (RT 128-129.) While wearing Nomex gloves, he removed a rifle and shotgun which were
21 in locked racks. (RT 129, 130.) He stated that he then secured the vehicle and observed that it
22 had several holes on the driver's side in the door and door panels, the rear driver's-side window
23 was broken, and he recovered a flashlight sitting the pile of glass. (RT 130.) After locking the
24 doors and pulling the keys out, he noticed shell casings on the ground slightly in front of the
25 driver's door, which were recovered and placed into evidence. (RT 130.)

26 **Don Dunbar** is a senior criminalist with the Department of Justice criminalistics
27 laboratory in Chico. He examined the Olympia rifle recovered by Sergeant Johnson at the
28 Dunnigan rest stop, the six Winchester .223 Remington cartridges recovered at [REDACTED]
Deputy Jameson of the Woodland Police Department, the seventeen Peters .223 Remington

1 cartridges recovered from near [REDACTED] by the Yolo County Sheriff's Office, the
2 Winchester .223 Remington cartridge and the Peters .223 Remington cartridge found in Topete's
3 vehicle, and the two Peters .223 Remington cartridges removed from the chamber and magazine.
4 (RT 78-80.) He found some latent prints on the weapon, but did not testify as to whether they
5 matched any individual. (RT 78.) He determined that all 25 cartridges were fired by the weapon
6 recovered (RT 78) and that this particular rifle ejects shells to the right and slightly backward
7 from the shooter's position. (RT 80.)

8 **Jesse Gonzales**, the resident of [REDACTED] knew Topete from
9 elementary and junior high school. (RT 136.) They now worked together (RT 136) and Topete
10 had come over to his house eight or nine times since Topete had been released from prison about
11 a year ago. (RT 138.) He'd last seen him a week and a half before (RT 136) and had left Topete a
12 voicemail message that day wishing him a happy father's day. (RT 144.)

13 He and his family were home the night of June 15, 2008. Around 9:00 p.m. he saw the
14 red flashing lights from a patrol car from his kitchen, when he looked out the curtain he saw a
15 parked vehicle and the sheriff's vehicle behind it. (RT 133.) The sheriff made eye contact with
16 him and waived him back, so Mr. Gonzales got his wife and kids and moved into the living
17 room. (RT 133.) About 45 seconds later he heard what sounded like four loud bangs on his metal
18 safety screen door. (RT 134.) He didn't hear anything more until 2:30 a.m. when SWAT Officer
19 Maze or Mace contacted him and asked him to come outside to determine whether a items found
20 near the residence belonged to him. (RT 135.) About a half hour later Detective Jimenez returned
21 with other officers to search the residence and conduct an interview. (RT 135.) Later that day he
22 looked again at the vehicle he had observed parked in front of the patrol car and recognized it as
23 the car he'd seen Marco Topete driving. (RT 144.)

24 Regarding his own history, Mr. Gonzales stated that he'd associated with Norteños when
25 he entered the California Youth Authority facility when he was 17 after being convicted for
26 assault with a deadly weapon. (RT 140.) He stated that it's "hard to just go in there and do your
27 time by yourself." (RT 140.) When asked about Topete's gang associations he stated, "sure he
28 had some affiliation because he was in prison." He did not know him to associate with Norteño

1 gang members and testified that he only really saw Topete's tattoo with his mother's name. (RT
2 139.)

3 C. Gang Testimony

4 **Ron Cordova**, a police officer for the City of Woodland Police Department and
5 investigator for the gang violence suppression unit, was called by the People to testify before the
6 Grand Jury. (RT 188.) Detective Cordova testified that Topete was validated as a gang member
7 by the Woodland Police Department in the early to mid 1990's. (RT 193.) He testified regarding
8 the Norteño preference for red and displaying the number 14 ("N" is the 14th letter of the
9 alphabet). (RT 194-195.) He also testified regarding Norteño perception of respect and that
10 violence against police officers would invoke the sort of fear of their gang that leads to respect.
11 (RT 197, 199.)

12 Regarding Topete, Detective Cordova identified many of Topete's tattoos as indicating
13 affiliation with the Norteño gang: "WLD" (Woodland) (RT 203); "Norte" on the abdomen (RT
14 204); one dot below the left thumb and four dots on the left hand (14) (RT 205); "rojo" (red) (RT
15 206); XIV (14) on the back of the head (RT 206); "Flacko" (Topete's gang moniker) on his neck
16 (RT 206); "Topete" on shoulders (RT 206); "14" above left knee (RT 206); left arm is
17 unreadable (RT 207). He also stated that the fact that he was wearing a red shirt as well as red
18 and white shorts indicated Norteño affiliation. He was also known to associate with Benito
19 (Junior) Fuentes, a known Norteño gang participant. (RT 204.)

20 Detective Cordova testified that Topete had been involved in a series of gang related
21 crimes, further substantiating his belief that Topete is a Norteño gang member. (RT 209.) In
22 1995 he participated in a Norteño vs. Soreño prison riot at California Corrections at Lassen; in
23 1996 he was detained by the Woodland Police Department wearing red boxer shorts, in the
24 company of four other gang members, and had "Norte" tattooed on his stomach; in 1997 he
25 participated in a confrontation of Soreño gang members in Woodland and was convicted of
26 assault with a deadly weapon; and in 1999 while in State Prison he was made a member of the
27 Northern Structure, a boot camp for the Nuestra Familia. (RT 209.)

28 Detective Cordova stated that he had been told "on several occasions that Mr. Topete was

1 the lead Norteño gang member in our area while he was out.” (RT 212.) He also testified that
2 when Topete was being questioned regarding his gang membership, an issue which determines
3 where it is safe to house him while incarcerated, he stated that he was “previously a member of
4 Northern Structure prison gang.” (RT 211.)

5 Detective Cordova testified regarding the relationship between the shooting of Deputy
6 Diaz and Topete’s alleged association with the Norteño street gang. He conceded that there is no
7 conclusive word as to whether the actions Topete allegedly took resulting in the shooting and
8 death of Deputy Diaz on June 15, 2008, would be looked upon favorably or unfavorably by the
9 Norteño organization. (RT 213.) Detective Cordova believes that Norteños are “celebrating the
10 death of an officer” (RT 214) but high level gang members inside the prison system have told
11 him that Topete may not be welcomed back because “he was deemed useless to the gang in
12 prison because he was no longer out here functioning, doing their business.” (RT 215.)

13 LAW AND ARGUMENT

14 I.

15 WHERE THE INDICTMENT IS NOT SUPPORTED BY PROBABLE 16 CAUSE THE LEGAL STANDARD REQUIRES THE COURT TO SET 17 ASIDE BOTH THE SPECIAL CIRCUMSTANCE AND THE SUBSTANTIVE COUNT RELATING TO GANG ACTIVITY

18 The defendant moves this court to grant defendant’s motion to dismiss pursuant to
19 section 995 of the Penal Code. Section 995 provides in relevant part that “...the indictment or
20 information shall be set aside by the court in which the defendant is arraigned, upon his or her
21 motion...when the defendant has been committed without reasonable or probable cause.” (Ca.
22 Pen. Code, section 995(2)(B).) The California Supreme Court has held that “although the
23 prosecution is not put to proof beyond a reasonable doubt in order to establish reasonable and
24 probable cause before the magistrate, nevertheless the burden is on the prosecution to produce
25 evidence that there is a reasonable probability, enough to induce a strong suspicion in the mind
26 of a man of ordinary caution or prudence, that a crime has been committed, and that defendant is
27 guilty.” (*Garabedian v. Superior Court* (1963) 59 Cal.2d 124, 126-127, citations omitted.)

28 More importantly, if the court’s order holding the defendant to answer is to withstand

1 scrutiny when attacked on the grounds of evidentiary insufficiency, "it must appear that some
2 showing of the existence of *each element of the charged crime* was made at the preliminary
3 examination." (*Ortega v Superior Court* (1982) 153 Cal.App.3d 244, 256, emphasis added.)

4 Emphasizing the importance of the preliminary hearing, our Supreme Court wrote:

5 We have long recognized the critical importance of the preliminary hearing as a
6 mechanism to weed out groundless claims and thereby avoid for both defendants and the
7 People the imposition and expense of an unnecessary criminal trial: Many an unjust
prosecution is stopped at that point, where lack of probable cause is clearly disclosed.

8 (*Mills v. Superior Court* (1986) 42 Cal.3d 951, 956, citations omitted; see also *Cummiskey v.*
9 *Superior Court* (1992) 3 Cal.4th 1018, 1026 (holding the same standard applies to setting aside an
10 indictment where a grand jury serves as "part of the charging process").) In this case, the grand
11 jury proceedings were the prosecution's opportunity to establish probable cause. Insofar as they
12 have failed to do, the charges relating to gang activity must be set aside.

13 Penal Code section 995 applies equally to special circumstances and substantive
14 charges. (*People v. Superior Court (Mandella)* (1983) 33 Cal.3d 754; *People v. Ghent* (1979)
15 90 Cal.3d. 944; *People v. Casillas* (2001) 92 Cal. App.4th 171.) The Supreme Court announced,
16 in the Attorney General's words, a "broad rule" making enhancement allegations subject to a
17 Penal Code section 995 motion. (*People v. Casillas, supra*, 92 Cal. App.4th at 176, citing
18 *Mandella, supra*, 33 Cal.3d at 758-763, superseded by statute on another point as stated in *In re*
19 *Jovan B.* (1993) 6 Cal. 4th 801, 814, fn. 8.) Therefore, both the special circumstance and the
20 substantive count alleging gang-related activity must be set aside.

21 II.

22 THE EXPERT TESTIMONY OFFERED HERE IS NOT SUFFICIENT TO 23 PROVIDE PROBABLE CAUSE THAT A CRIME WAS COMMITTED FOR THE BENEFIT OF A GANG.

24 Mere membership in an organization is not sufficient to establish that conduct, though
25 criminal, is specifically intended to further the activities of a street gang on a particular occasion.
26 (*In re Wing Y.* (1977) 67 Cal.App.3d 69, 79; *Scales v. U.S.* (1961) 367 U.S. 203.) Although
27 *People v. Gardeley* (1996) 14 Cal.4th 60, holds that the testimony of a police detective, testifying
28 as an expert, can be sufficient to prove a crime was a "gang-related" activity, there is a steadily

1 increasing set of case law that requires that the testimony amount to more than just the "expert's"
2 opinion that the individual act benefited the gang.

3 For example, in *People v. Albarran* (2007) 149 Cal.App.4th 214), the defendant was
4 charged with murder with gang enhancements attached. In that case, a known gang member and
5 an accomplice shot at a house during a private party hosted by a man from another gang. No
6 gang names or signs were displayed during the incident. The incident did not occur on gang turf,
7 the crime was not claimed by the gang after it occurred, and there was nothing inherent in the
8 facts that suggested the shooting was gang motivated. At trial, a gang expert was allowed to
9 testify that Albarran was an admitted member of a gang, and that the shooting was gang
10 motivated. The gang expert also testified that the shooting served to enhance the reputation of the
11 gang and was done to gain respect within the gang "by word of mouth, word on the street." (*Id.*,
12 at 221.) The judge admitted the testimony and Albarran was ultimately convicted of the gang
13 enhancements.

14 The Court of Appeals reversed Albarran's conviction for murder, holding that the gang
15 evidence should not have been admitted at the trial because "there was nothing inherent in the
16 facts of the shooting to suggest any specific gang motive." (*Id.*, at 227.) In reversing the gang
17 enhancement conviction, the Court of Appeal held, "there was insufficient evidence to support
18 the contention that this shooting was done with the intent to gain respect." (*Ibid.*) "The motive
19 for the underlying crimes, in particular the shooting ... was not apparent from the circumstances
20 of the crime," noting that "the shooting occurred at a private birthday party for the victim's
21 cousin." (*Ibid.*) Despite the expert's opinion that the crime was committed to gain respect, the
22 Court disagreed, holding "... this shooting presented no signs of gang member's efforts in that
23 regard-there was no evidence that the shooters announced their presence or purpose before,
24 during or after the shooting." (*Ibid.*) The Court also found it significant that "there was no
25 evidence presented that any gang members had "bragged" about their involvement or created
26 graffiti and took credit for it." (*Ibid.*) In conclusion, the court ruled "there is nothing inherent in
27 the facts of the shooting to suggest any specific gang motive. In the final analysis, the only
28 evidence to support the "respect" motive is the fact of defendant's gang affiliation." (*Ibid.*)

1 The facts here are much like *Albarran*. There is no evidence that Mr. Topete announced
2 his gang name or any gang purpose at any time. There is no evidence that the incident occurred
3 on gang turf. There is no suggestion that he bragged to others about the shooting and most
4 importantly, there is no evidence to suggest that Topete's actions were motivated by any specific
5 gang motive. In *Albarran* there were two participants to the alleged crime, both members of the
6 same gang. In the present case, the only alleged participant was the defendant, which further
7 shows that the shooting was not motivated to further any gang purpose. (*People v. Morales*
8 (2003) 112 Cal.App.4th 1176, 1178.) The perception by a gang expert, that a spur of the moment
9 car pursuit to avoid arrest, confers a gang benefit because it results in the shooting of an officer,
10 is not reasonable.

11 The essence of the prosecution's theory in this case is that when a gang member commits
12 a crime, regardless of location, specific gang affiliation, or motive, it benefits the gang because
13 someone, somewhere, might attribute the incident to that gang. This alleged benefit is purely
14 speculative. The prosecution's contention that any time a gang member is involved in a crime,
15 the crime is inherently gang related, is contrary to section 186.22, which punishes conduct, not
16 mere association.

17 The holding in *People v. Ramon*, 2009 Cal.App. Lexis 1103, expressly forbids a finding
18 of probable cause based upon speculation of a gang benefit by a police officer acting as a "gang
19 expert" where there are no other indicia of specific intent to benefit or further the activities of a
20 street gang. In that case, defendant Ramon and co-defendant Martinez were members of a street
21 gang and were stopped in the territory known to be claimed by that street gang while driving a
22 stolen vehicle and in possession of an unregistered firearm. (*Id.*, at *6.) Kern County Deputy
23 Sheriff Scot Lopez testified as an expert witness. (*Id.*, at *3.) He "opined" that the theft was
24 intended to benefit the street gang based on the inference that both the firearm and the vehicle
25 could be used by the street gang to commit crimes. (*Id.*, *6.) The appellate court reversed the
26 trial court's finding that the testimony was sufficient to support a section 186.22(b)(1) gang
27 enhancement.

28 The court found that the facts of *Ramon* were indistinguishable from those in *People v.*
Killebrew (2002) 103 Cal.App.4th 644, or *In re Frank S.* (2006) 141 Cal.App.4th 1192. In

1 *Killbrew*, the Appellate Court overturned a finding of a gang enhancement based upon the
2 testimony of an officer qualified as a "gang expert" that every individual who was a gang
3 member in three different cars would know there was a firearm in one of the vehicles and would
4 intend to possess it for "mutual protection." That court held that such testimony was "nothing
5 more than his view of how the case should have been decided." (*Killbrew, supra*, 103
6 Cal.App.4th at 658.)

7 Likewise, in *In re Frank S.*, the appellate court reversed the trial court's finding of a gang
8 enhancement based solely on the testimony of an officer/"gang expert" that mere possession of a
9 knife by a minor was for the benefit of the gang. (*In re Frank S., supra*, 141 Cal.App.4th at
10 1199.) The defendant in that case testified that he carried the knife to "protect himself from the
11 'Southerners.'" (*Id.*, at 1195.) Even so, the court held that the admitting the officer's testimony
12 without any other substantial evidence "opens the door for prosecutors to enhance many felonies
13 as gang-related and extends the purpose of the statute beyond what the Legislature intended."
14 (*Id.*, at 1199.)

15 Like *Ramon*, the facts of this case are indistinguishable from those in *Killebrew* and *In re*
16 *Frank S.* In addition, the fact that Topete acted alone and that the expert did not state he was in
17 "gang territory" leaves the "expert" testimony in this case on even shakier ground than that in
18 *Ramon*. Like the court stated in *Ramon*, the expert "simply informed the jury of how he felt the
19 case should be resolved." (*Ramon*, at *8.) His opinion was "mere speculation and could not
20 provide substantial evidence to support the jury's finding... While it is possible the [defendant
21 was] acting for the benefit of the gang, a mere possibility is nothing more than speculation.
22 Speculation is not substantial evidence." (*Ibid* (citing *People v. Perez* (1992) 2 Cal.4th 1117,
23 1133).)

24 III.

25 THE GANG ENHANCEMENT AND SUBSTANTIVE GANG COUNT 26 SHOULD BE DISMISSED AS THERE IS NO EVIDENCE THAT THE 27 CRIME WAS COMMITTED WITH THE SPECIFIC INTENT TO 28 PROMOTE THE GANG OR FOR THE BENEFIT OF THE GANG.

The statute regarding Gang Enhancements states, "[A]ny person who is convicted of a
felony committed/for the benefit of, at the direction of, or in association with any criminal street

1 gang, with the specific intent to promote, further, or assist in any criminal conduct by gang
2 members," shall suffer added punishment. (*People v. Margarejo* (2008) 162 Cal. App. 4th 102,
3 107.) In the *Maragarejo* case, the court of appeal affirmed the judgment, holding that there was
4 sufficient evidence to uphold the gang enhancement. The facts in *Maragarejo* are as follows:
5 Luis Margarejo led police on a long car chase. During the chase, Margarejo, a member of the
6 Highland Park gang, continually made the Highland Park gang sign to pedestrians he passed.
7 Margarejo even made this sign to the police. Police saw Margarejo's gun when he decided to
8 sprint from his car. They followed him to an apartment, where they found the gun.

9 The facts here are distinguishable from *Margarejo*. Here, there is no evidence that Mr.
10 Topete flashed any gang signs to the officer or to anyone else from the time he was initially
11 stopped at the gas station until the time the officer was shot. There is ample dash cam footage,
12 which was viewed by the grand jury, capturing the initial stop, chase, and exchange of gunfire.
13 At no time does Topete reach his arm out the window and throw a gang sign; at no time does he
14 yell out to claim Norteño or even his home "turf" of Woodland. Topete led an officer on a high
15 speed chase, just as in *Margarejo*, but there is no evidence to suggest that he was attempting to
16 promote or further any benefit of the gang. To the contrary, the evidence strongly supports the
17 inference that he was merely trying to avoid arrest.

18 The court reasoned in *Margarejo* that:

19 "We routinely draw inferences about intent from the predictable results of action. We
20 cannot look into people's minds directly to see their purposes. We can discover mental
21 state only from how people act and what they say. Here, Margarejo acted like he wanted
22 to help his gang. His actions did his own escape no good. When fleeing at high speed, it
23 is better to keep both hands on the wheel and to avoid creating a striking impression in
24 the mind of every witness along the way. Logically, Margarejo must have had another
25 purpose for staging this show. The message he broadcast, the *only* message he broadcast,
26 was the gang message."

27 (*Id.*, at 110.)

28 The instant case is distinguishable, since it is clear from the defendant's actions that he
was attempting to flee the officers in an effort to avoid arrest. Nothing in his actions would allow
one to infer that he was acting for the benefit of a criminal street gang. As the court stated, we

1 cannot look into people's minds to determine their intent, we must look to the person's actions.
2 Mr. Topete's actions would allow one to logically conclude that he was attempting to evade the
3 officer, not further any gang purpose. In *Margarejo* the defendant was actually acting in a way
4 that "did his own escape no good." (*Id.*, at 110.) Here, Mr. Topete was not concerned with
5 flashing gang signs, he was concerned with evading the officer.

6 The court in *People v. Morales* (2003) 112 Cal.App.4th 1176 distinguishes between one
7 gang member committing a crime as opposed to multiple members. The court stated,

8 "Defendant argues that reliance on evidence that one gang member committed a crime in
9 association with other gang members is 'circular' Not so. Arguably, such evidence
10 alone would be insufficient, even when supported by expert opinion, to show that a crime
11 was committed for the *benefit* of a gang. The crucial element, however, requires that the
12 crime be committed (1) for the benefit of, (2) at the direction of, or (3) in *association*
13 with a gang. Thus, the typical close case is one in which one gang member, acting alone,
14 commits a crime. Admittedly, it is conceivable that several gang members could commit
15 a crime together, yet be on a frolic and detour unrelated to the gang. Here, however, there
16 was no evidence of this. Thus, the jury could reasonably infer the requisite association
17 from the very fact that defendant committed the charged crimes in association with
18 fellow gang members."

15 (*Morales, supra*, 112 Cal.App.4th at 1197.)

16 This case falls squarely within the dicta of *Morales* which indicates that, typically, expert
17 testimony would be insufficient evidence where a gang member acts alone to establish that the
18 crime was committed for the benefit of the gang. While there are cases where a lone alleged
19 gang member commits a crime and provides other evidence that it is intended for the gang, as in
20 *Margarejo*, none of those facts were established in this case.

21 CONCLUSION

22 For the foregoing reasons, defendant urges this court to grant his motion to dismiss the gang
23 allegations in the Indictment filed herein.

24 Dated: September 9, 2009

25 HAYES H. GABLE III
26 THOMAS A. PURTELL

27 By: 

28 HAYES H. GABLE III
Attorney for the Defendant
MARCO ANTONIO TOPETE

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen years and not a party to the above-entitled action; my business address is 430 Third Street, Woodland, CA 95695

On the date below, I served the following document(s):

**NOTICE OF MOTION AND MOTION TO SET ASIDE CIRCUMSTANCE
C OF COUNT 1 AND COUNT 5 OF THE INDICTMENT [Penal Code §
995]**

() BY MAIL. I caused such envelope, with postage thereon fully prepaid, to be placed in the United States Mail at Sacramento, California addressed as follows:

(X) BY PERSONAL SERVICE. I caused such document(s) to be delivered by hand to the offices of the person(s) listed below:

JEFF REISIG
GARRET HAMILTON
Yolo County District Attorney
301 Second Street
Woodland, CA 95695

() BY FACSIMILE SERVICE. I caused the document(s) to be served via facsimile to the person(s) listed below:

() BY EMAIL ATTACHMENT. I caused the document(s) to be served via email as an attachment to the person(s) listed below:

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 11, 2009, at Woodland, California.


Declarant